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No. 73-592

In the Supreme Court of the United States

OCTOBER TERM, 1973

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Louis Guido, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The order of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on July 16, 1973. Petition for rehearing was denied on Sept. 4, 1973 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Was petitioner deprived of due process of law because of total insufficiency of the evidence to support the jury's verdict of conviction upon each of the five counts; and, more particularly, may his convictions be permitted to stand where the trial judge, in a separate bench trial of a co-indictee, upon the stipulated evidence from petitioner's trial, acquitted said co-indictee in a decision making specific factual findings irreconcilably contrary to the jury's verdict as to those counts on which petitioner was convicted?

2. Was petitioner's right to due process of law violated where there was neither proof of actual or constructive possession of narcotics, nor proof of knowledge of illegal importation, but where the jury was nonetheless instructed that petitioner could be convicted of illegal possession of narcotics; moreover, was such jury instruction fatally erroneous for failure to clarify that proof of possession merely permits, but does not require, a finding of knowledge of illegal importation, contrary to the requirements of due process and in conflict with pertinent instructions required in other federal circuits?

3. Were petitioner's rights under the Sixth Amendment and under the Jencks Act violated by failure of a government agent, who testified against petitioner at trial, to make any notes of his alleged observations, and by the destruction of notes by another such agent, thus precluding petitioner from meaningful cross-examination?

4. Did the trial court commit reversible error by precluding the jury, in advance, from the opportunity to in-

quire about portions of the evidence in petitioner's lengthy trial, about which it may have needed its recollection refreshed, particularly in view of the voluminous testimony and evidence of record and the paucity of competent evidence against petitioner; more particularly, did such spontaneous instruction by the court constitute an abdication of the responsibility to exercise judicial discretion?

5. Did the trial court's denial of petitioner's motion for new trial based on newly discovered evidence constitute an abuse of discretion, where the newly discovered evidence conclusively established the falsity of certain government evidence, and subsequently was taken as true by the trial court in the bench trial of petitioner's co-indictee which resulted in said co-indictee's acquittal; and may petitioner's convictions be permitted to stand, consistent with due process of law, under such circumstances?

6. Was petitioner deprived of meaningful appellate review in violation of due process, where the Court of Appeals, by way of an unpublished "order" rather than a published opinion, decided matters of substantive constitutional import summarily in favor of the government and against petitioner, without discussion of petitioner's properly raised arguments and authorities.

Constitutional Provisions and Statutes

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . in any criminal case . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> **"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."**

21 U.S.C. 174 provides, in pertinent part:

> **"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .**
>
> **"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."**

Rule 28, Rules of the United States Court of Appeals for the Seventh Circuit, provides as follows:

> *Circuit Rule 28.* (The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States):
>
> *Policy*
>
> It is the policy of this circuit to reduce the proliferation of published opinions.

Publication

The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published.

"Published" or "publication" means:

(1) Printing the opinion as a slip opinion;

(2) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(3) Permitting publication by legal publishing companies as they see fit; and

(4) Unlimited citation as precedent.

Unpublished orders:

(1) Shall be typewritten and reproduced by copying machine;

(2) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and shall be available to the public on the same basis as any other pleading in the case;

(3) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth.

(4) Shall not be cited as precedent (a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of res judicata, collateral estoppel or law of the case.

Guidelines For Method Of Disposition

Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;
(2) Involve an issue of continuing public interest;
(3) Criticize or question existing law; or
(4) Constitute a significant and non-duplicative contribution to legal literature.
(a) by a historical review of law;
(b) by describing legislative history; or
(c) by resolving or creating a conflict in the law.

Unpublished orders:

(1) May be oral and delivered from the bench, which shall be recorded by the Clerk of the Court, or in writing with only, or little more than, the judgment rendered, in appeals which
(a) are frivolous or
(b) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where
(i) a controlling statute or decision determines the appeals;
(ii) issues are factual only and judgment appealed from is supported by evidence;
(iii) order appealed from is non-appealable or this Court lacks jurisdiction or appellant lacks standing to sue; or

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(a) are not frivolous but

(b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

Responsibility For Determining Whether Disposition Is To Be By Order Or Opinion

The determination to dispose of an appeal by unpublished order or published opinion shall be made by a majority of the panel rendering the decision.

The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

Effective Date

The effective date of this rule is February 1, 1973.

STATEMENT OF THE CASE

Petitioner, Louis Guido, was tried alone. He was named in an indictment returned March 5, 1971 (71 CR 221) and charged with having violated the narcotic laws, 21 U.S.C. 174. The indictment was in 12 counts; but Guido was named only in 5.

In Count 1 he was charged with conspiracy to violate the narcotic laws with alleged co-conspirators, Franklin and Michael Carioscia, and Rudolph Piemonte, in that he conspired with those three men to receive and sell narcotics after he knew the same was imported illegally into the United States (A. 1).[1] In Count 6, he was charged with the

[1] "A" refers to the printed Appendix to Petitioner's Brief filed in the Court of Appeals for the Seventh Circuit, No. 72-1782; "R" refers to the Record on Appeal filed therein; "Tr." refers to the transcript of proceedings.

Carioscias and Piemonte with selling heroin on October 14, 1970 to Dave Harris, Jr., not in pursuance of a written order form, in violation of 26 U.S. Code, 4705(a); and Count 7 charged he possessed the same narcotics on October 14, 1970, knowing it to have been imported into the United States contrary to law in violation of 21 U.S. Code 174. (A. 1). Counts 10 and 11, respectively, charged Guido with the sale of heroin to Harris and with possession of the same heroin on January 20, 1971. (A. 2).

Counts 2 and 3 charged the Carioscias with selling to Harris and possessing the narcotics on August 19, 1970; Counts 4 and 5 charged Franklin Carioscia alone with selling heroin to Harris and possessing same on September 2, 1970; Counts 8 and 9 charged the Carioscias with selling to Harris and possessing the same heroin on December 4, 1970; and Count 12 charged the Carioscias with possessing a quantity of heroin on February 23, 1971. (A. 1-2).

Before Guido's trial, the Carioscia brothers pled guilty. Piemonte had not yet been arrested at the time of the return of the indictment or at the time of Guido's trial; he surrendered sometime after the Guido trial. His surrender and the revelations of his whereabouts in Mexico on January 19, 1971, gave rise to Guido's post-trial motion for new trial, inasmuch as two agents had testified they had seen Piemonte in Chicago on January 19, 1971, whereas, in fact, Piemonte was in Mexico, as the stipulated proof at Piemonte's trial showed.

Piemonte went to trial before Judge McMillen (the same trial judge as in the case at bar) on the stipulated evidence of the transcript of the Guido trial, together with certain affidavits demonstrating Piemonte's absence from Chicago in January, 1971.

The trial judge denied Guido's motion for acquittal; *on the identical facts,* the court acquitted Piemonte of the possession or sale of narcotics on October 14, 1970 (Counts 6 and 7).[2]

Petitioner's motions to dismiss certain of the counts of the indictment for duplicity and for a severance from those counts where he was not named were denied on August 25, 1971. (R. 15-16). Trial commenced before the Hon. Thomas R. McMillen on February 14, 1972 and continued to February 22, 1972, when the jury returned its verdict finding petitioner guilty on those counts in which he was named in the indictments, Counts 1, 6, 7, 10 and 11. Petitioner's motion for judgment of acquittal notwithstanding the verdict was denied; as likewise was his motion for a new trial on the grounds of newly discovered evidence. Petitioner was sentenced on June 19, 1972 to 20 years on each of the several counts, the sentences to run concurrent. (R. 34).

Statement of the Facts.

Prefatory Statement

All sales of narcotics on all dates set out in the indictment were made to a government paid informer, Dave Harris, Jr., by either Frank or Michael Carioscia, brothers. At no time, on any of the dates in question, was defendant Guido present at or near any of the sales, nor was there any testimony that he participated in the negotiations for said sale. Neither was there any testimony that he ever possessed any of the narcotics involved in the case.

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[2] A copy of the trial judge's decision and order acquitting Piemonte is set forth as Appendix C to this Petition.

Defendant continuously objected to testimony by Harris and the narcotic agents of the events which occurred on dates other than those for which Guido was named in the indictment, for Guido was charged only with selling or possessing narcotics on October 14, 1970 and January 20, 1971. The court allowed all such testimony to be received by the jury during the presentation of the government's case, upon the government's assertion that it would "connect up the events" (A. 5, 6). At the conclusion of the government's case, the court permitted the jury to consider the entirety of the evidence presented and overruled defendant's motion for mistrial. (A. 43).

The government's proof was made by testimony of a paid informer, Dave Harris, Jr. (A. 12) working under the close supervision and observation of the various narcotic agents. All of his negotiations for narcotics were either with Franklin or Michael Carioscia.

The evidence is set out in Appendix D, hereto.[3]

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[3] Because this Petition is largely grounded on the argument that the evidence was so insufficient as to render petitioner's convictions violative of due process of law, it is necessary to set forth the evidence in considerable detail. We do so in Appendix D, hereto.

REASONS FOR GRANTING THE WRIT

1.

The evidence was totally insufficient to support any of the five counts on which petitioner was convicted, depriving petitioner of due process of law. Moreover, his convictions must not be permitted to stand where the trial judge who presided at petitioner's jury trial, in a separate bench trial of a co-indictee upon the stipulated evidence from petitioner's trial, acquitted the co-indictee in a decision making specific factual findings irreconcilably contrary to the jury's verdict in defendant's case. Certiorari should be granted to reiterate the due process requirement of sufficient evidence to support conviction, and to review the complex problem arising where, as here, separate co-indictees are tried by jury and by the court, respectively, and the jury's verdict and the Judge's ultimate finding on the identical facts as to guilt or innocence are inconsistent (the latter aspect apparently presenting a question of first impression).

A.

Insufficiency of Evidence

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364.

Moreover, this Court has definitively held that a conviction devoid of evidentiary support is violative of due process of law, in *Thompson* v. *City of Louisville*, 362 U.S.

199, 204. See also *Gregory* v. *City of Chicago,* 394 U.S. 111, 112; *Johnson* v. *Florida,* 391 U.S. 596, 598.

We submit that lack of evidence against petitioner renders his convictions violative of due process.

Prefatory Statement

The government acknowledged that there was no proof of possession of narcotics, constructive or otherwise, shown against Guido. The government also acknowledged there was no proof it made that defendant knew the narcotics were illegally imported into the United States.

The government bottomed its entire case on the theory that a conspiracy was shown between petitioner and the Carioscia brothers—and, we suppose, Piemonte, also. For the government relied wholly on the conspiracy concept: "If we don't show a conspiracy, then apparently we don't have a case." (A. 5). And proof that Guido was "the source" of narcotics depends upon "where Mr. Guido was seen with respect to the acts as they occurred." (A. 42).

If ever a case demonstrated the warning set out by Mr. Justice Jackson in *Krulewitch* v. *United States,* 336 U.S. 440, 453, this is it.

And to Justice Jackson's caveat, we must add that it would be a violent principle to pile inference upon inference in order to guess or speculate a fact intended to be proven. *Causey* v. *United States,* 352 F.2d 203, 207 (5 Cir. 1965).

There is one further rule of conspiracy law with which we preface our prospective analysis of the evidence and legal argument thereon, and that is, that mere association with some conspirators is insufficient to make a person a participant in the alleged conspiracy. *United States* v. *Ma-*

loney, 200 F.2d 344, 347 (7 Cir. 1952); *United States* v. *Hickey,* 360 F.2d 127, 138-39 (7 Cir. 1966); *United States* v. *Falcone,* 311 U.S. 205; *Jong* v. *United States,* 245 F.2d 392, 394 (9 Cir. 1957); *Panci* v. *United States,* 256 F.2d 308, 312 (5 Cir. 1958).

And lastly, this Court has declared that an intent to participate in a conspiracy may be inferred from knowledge of the conspiracy, ". . . . but the evidence of knowledge must be clear, not equivocal." *Ingram* v. *United States,* 360 U.S. 672, 680.

The Evidence Does Not Admit of Any Proof of Conspiracy Beyond A Reasonable Doubt.

The jury was certainly confused as to what they were to consider in determining the case.[4] When the defendant objected to acts and statements made by the Carioscias to Harris, and he to them, regarding events which occurred in August and September of 1970, the court overruled defendant's objections, and allowed the physical evidence of narcotics to be received into evidence and to be considered by the jury (A. 43). The government's closing argument also referred to the August and September, 1970 Carioscia-Harris transactions (Tr. 1013, 1016, 1017, 1018).

The appeals court likewise was confused, for it too considered against petitioner evidence concerning transactions which occurred prior to the earliest possible connection of petitioner with the case. (See App. A, pp. 2, 5-8).

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[4] During their deliberations, the jury inquired whether they were to construe the indictment as beginning on October 14, 1970 as to Guido, as opposed to August 1, 1970 as stated in the indictment. (A. 1). The court replied in the affirmative. (A. 49).

The October 14, 1970 incident

And now enter the sinister events involving Guido on October 14, 1970. Around 9:00 a.m. Guido left his apartment at 633 South Laflin Street, Chicago, and walked a block south, to his place of employment, Del's Restaurant, at Lexington and Laflin Streets (A. 17). Five minutes later, Rudolph Piemonte, alleged co-conspirator, left Del's Tap with Guido and entered Guido's apartment building. As they walked the block, they are witnessed in conversation with arms waving in gesticulation (A. 17-18). This is to show, like the stage magician, that there was nothing in Piemonte's hands when he went into Guido's apartment and, we suppose, nothing up his sleeve, either. But when they left Guido's apartment, a few minutes later Piemonte was seen carrying a small brown bag not unlike a million other bags (A. 19); Guido waves and gesticulates, whereupon Piemonte rolls the bag and puts it under his arm. (A. 18) Piemonte goes to his mother's house at 1437 Flournoy Street (A. 19) and Guido goes back to Del's Restaurant (A. 18).

The scene shifts to approximately 12 hours later. Frank Carioscia sells some narcotics to Harris for $8,000 (A. 8); the narcotics were in a brown bag which Frank Carioscia gave to Harris. The bag and its contents, heroin, were admitted into evidence, over objections, as Gov't Exhibit 3C (A. 43). No evidence the bag was given by Piemonte to Harris, none that Piemonte got it from Guido. But more important, no evidence was presented as to what was in the bag when Piemonte was waving it in the air on the street for all the agents to see (A. 18). And certainly, the agents had no roentgenological or

extrasensory capacities; they testified they could not tell what was in bags, when so asked. See, *i.e.*, A. 33.

The transaction between Harris and Frank Carioscia on October 14, 1970 was the basis for Guido's convictions on Counts 6 and 7, charging Guido with selling heroin *to Harris*, and further charging that Guido possessed the narcotics on that date, knowing the same to have been illegally imported (A. 1).

No fingerprints of Guido were shown to be on the bag—or its contents. There was not even a showing that the brown bag delivered by Frank Carioscia to Harris around 8:30 p.m. on October 14 was the same bag as *Piemonte* possessed at 9:00 a.m. that morning—much less that there were any narcotics in the bag Piemonte is supposed to have waved in the air for all to see.[5] By what alchemist's wild stretch of even the government's imagination is Guido charged with the possession of the narcotics sold to Harris—or with the sale on October 14, 1970? The sufficient and short answer should be *Panci* v. *United States*, 256 F.2d 308 (5 Cir. 1958). That case, too, is a "brown bag" case. The Fifth Circuit stated, in reversing:

> "[I]n circumstantial evidence cases this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except

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[5] Indeed, the trial judge, in acquitting Piemonte, specifically concluded that there was no such proof. (See Part C of Point I, *infra;* App. C, p. 14.)

that of guilt, and has equally without wavering applied it." *Id.* at 312.[6]

In *Panci*, the testimony about "a brown bag" was more incriminatory than in the case at bar. There was testimony that an agent saw one, Giardina, go into a place where he spoke to Panci:

> "That he saw Panci and Giardina leave the store; that he saw them sit on stools next to each other at the Toddle House cafe; that while they were sitting there drinking coffee, the defendant withdrew his left hand from his pocket and passed a small brown paper bag behind his back to Giardina; and that they thereafter left the Toddle House and returned to the barbecue stand. It is true, too, that there was testimony: that Panci gave Giardina $1,050 for the purchase of three ounces of heroin; and that sometime afterward Giardina went into his own house and took one ounce of heroin from the total of three in a brown paper bag. The record does not support the government's contention that the brown paper bag from which the heroin was taken was identified by anyone as the one given Giardina by defendant. If it did, this would not be important. *What is impor-*

[6] In anticipation of the prosecution argument, raised and apparently adopted below, that neither the Fifth Circuit nor any other presently follows this formulation, see *United States* v. *Warner*, 441 F.2d 821, 825 (5 Cir. 1971); *United States* v. *Davis*, 443 F.2d 560, 564 (5 Cir. 1971); *United States* v. *Restano*, 449 F.2d 485, 488 (5 Cir. 1971); *United States* v. *Willoz*, 449 F.2d 1321, 1323 (5 Cir. 1971); *United States* v. *Bullock*, 451 F.2d 884, 891 (5 Cir. 1971); see also *United States* v. *Hickey*, 360 F.2d 127, 136 (7 Cir. 1966). This Court's decision in *Holland* v. *United States*, 348 U.S. 121, 139-140, is not to the contrary, for that ruling was only that the jury need not specifically be so instructed. That such rule still should be utilized by reviewing courts in determining the sufficiency of the evidence, however, is clear.

> *tant here is that no one testified that the brown paper bag given* Giardina by defendant had narcotics in it when it was given to him. In short, the testimony of the government agent that Giardina was seen with Panci and that Panci passed a paper bag to him was wholly insufficient to establish his guilt. While, therefore, the testimony of the government witness well served its purpose of smearing Panci because he was seen associating with Giardina, no evidence whatever was offered to support its claim that Giardina or anyone else obtained heroin from Panci." (emphasis in original). *Ibid.*

The Court of Appeals in the case at bar failed even to mention the *Panci* case, although it was cited and discussed in Petitioner's Brief, pp. 23-24. (See Point 6, *infra.*) Thus the instant decision of the Seventh Circuit directly conflicts with decisional law of the Fifth Circuit.

The January 20, 1971 incident.

With respect to the events of January 20, 1971, the evidence is equally as substantially weak.

Guido was seen on the afternoon of January 19, 1971 with Michael Carioscia and with another man being driven to a drug store, and later being driven to an address, 631 S. Wells Street, Chicago, where a drug company had its offices. The third man went in and came out. There is naked any evidence as to what transpired.

Coming to January 20, 1971, the essential facts upon which the government relies is a sale of narcotics to Harris by Frank Carioscia. Guido is charged in Counts 10 and 11 with the sale and possession of the narcotics (A. 2). The sale took place in Harris' car on the corner

of Loomis and Flournoy Streets. Harris' car was parked on the southeast corner of those streets at about 7:30 p.m.[7]

At the time when Carioscia alighted from Harris' car, he had a Carson Pirie Scott shopping bag, in which, at the narcotic bureau, $32,000 had been placed in a "Madigan" shopping bag (A. 14). Carioscia walked *south* on Loomis Street to Lexington (one block south of Flournoy Street) and then he turned west on Lexington Street. Even though there were about 15 agents in the area (A. 30), Carioscia was lost from everybody's view for about ten minutes, from about 7:35 to 7:45 p.m. (A. 30). His father's house was located in about the middle of Lexington Street between Loomis and Laflin Streets (A. 29). Laflin is one block east of Loomis Street. No agent testified to Carioscia's whereabouts for those ten minutes (A. 30).

Carioscia was next seen coming from Lexington onto Laflin, walking north on Laflin to the area, 633 S. Laflin Street and was seen by an agent standing in front of the Guido residence with a Carson Pirie Scott shopping bag in hand (A. 28). Absolutely no evidence as to what was contained in the bag at that time.

Carioscia was seen ten minutes later exiting the 633 S. Laflin area, at which time he was not carrying anything (A. 28).

He walked to his car at 810 S. Loomis Street, and then drove to Turzitti's tavern at 1121 S. Racine, and entered at about 8:10 p.m. (A. 35). At first, Frank was at the east end of the bar, then he joined Guido and two females

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[7] Harris testified the event took place, he was certain, at about 8:00 p.m. (A. 12); but all agents who testified on this point contradicted him as to the time (A. 15, 28, 32).

who were drinking at the bar (A. 35). Agents testified that Guido gave Carioscia some money from "a large roll of bills" which Guido took from his pocket (A. 36, 39). One agent, Thompson, testified he overheard Guido ask Frank, "How did it go?", to which Frank replied, "Okay." (A. 39).

The parties left the tavern at about 8:45 p.m., with Carioscia driving Guido home to 633 S. Laflin (A. 29).

No search was made of Guido's apartment for the Carson Pirie Scott bag or for the $32,000 (A. 16). No marked money or narcotics was ever found in his home or on his person when Guido was arrested on February 24, 1971. (A. 29).

Just as in *Montoya* v. *United States,* 402 F.2d 847 (5 Cir. 1968):

> "There is ample cause for suspicion and conjecture in this case, but suspicion and conjecture are not sufficient to sustain a conviction. In our view, the jury was not justified in reaching a verdict of guilty, even though they accepted the Government's evidence as true and accorded the full weight. All of the evidence against Montoya is circumstantial. In order to sustain a conviction in circumstantial evidence cases, the inferences to be drawn from the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence . . . (Citing cases)." *Id.* at 850.

In *Washington* v. *United States,* 357 U.S. 348, in a *per curiam* opinion, this Court reversed for insufficiency of evidence the conviction affirmed by the Seventh Circuit (Judge Duffy dissenting) in *United States* v. *Washington,* 253 F.2d 913 (7 Cir. 1958). In *Washington,* an informer telephoned the defendant at an agent's request. He asked for heroin, and told the agent after the con-

versation that the defendant would deliver. Within minutes, the defendant was seen by agents leaving his residence with a co-defendant, who, an hour after the telephone conversation, delivered heroin to the informer's apartment. In dissent (which became the law of the case), Judge Duffy stated:

> "No matter how vile or disgusting the charged criminal offense may be, the defendant thus charged still must be convicted by evidence that is convincing beyond a reasonable doubt."

To similar effect see *Jensen* v. *United States,* 403 F.2d 1018 (9 Cir. 1968).

In *United States* v. *Landry,* 257 F.2d 425 (7 Cir. 1958) the court, in reversing, stated:

> "In fact, the government is quite liberal with its speculative suggestions. It is suggested that the relationship between Dolores and Landry makes it entirely probable that Landry had placed the narcotics where they were found. Again, it is suggested that the bond of affection existing between Dolores and Landry might well result in a situation like the one found to exist. *We reject the idea that speculation can be employed as a substitute for proof* . . . (Id. at 431).
>
> "Congress has created a presumption upon proof of the existence of a fact, and now the government would have the Court presume the fact." (*Id.* at 432; emphasis added)

A somewhat stronger case on facts than in the case at bar, but yet reversed for insufficiency of evidence, is *Ong Way Jong* v. *United States,* 245 F.2d 392 (9 Cir. 1957).

The Ninth Circuit, in reversing, said that as to Ong, "there is a strong suspicion that he was" dealing in narcotics.

> "The agents followed Wee during all of the negotiations relating to the sale of February 1. They saw Wee meet no one but Ong when Wee brought the narcotics back for sale. They saw Wee go to meet Ong immediately after he got the money for the sale. In each instance during the negotiations of the sale of February 1, when Wee said he was going to meet his 'connection', he met Ong. All this sounds quite convincing, and undoubtedly the agents themselves were convinced and convinced the learned trial judge that Ong was guilty." (*Id.* at 396).

But it was held there was insufficient proof.

In *Diaz-Rosendo* v. *United States,* 364 F.2d 941 (9 Cir. 1966), the Court reversed a conspiracy conviction for smuggling marijuana into the country, stating that the evidence must establish guilt beyond a reasonable doubt, even if circumstantial. "Guilt cannot be established by mere association." 364 F.2d 941, 944. To the same effect see *United States* v. *Falcone,* 311 U.S. 205, 210.

Link v. *United States,* 352 F.2d 203 (5 Cir. 1965), spells out the requirements to show a conspiracy:

> "Many of the principles of the law of conspiracy are too well established to require elaboration here. We enumerate a few which are of particular applicability to a case of the kind now to be decided. To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof. Charges of conspiracy are not to be made out by piling inference upon inference. Guilt of conspiracy may not be inferred from mere association. It is true that the proof may be circumstantial or direct or both, but it must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it, and with that knowledge intentionally did some act or thing to further or carry on that conspiracy." *Id.* at 207.

The government's reliance on the "source"

The "source" of the narcotics, according to the government's theory as announced to the court and to the jury, was Guido. There is no proof of this except by braiding inference upon inference, and except by emasculating firm principles of criminal law and due process which require proof of the act charged. *Cf. Thompson* v. *City of Louisville,* 362 U.S. 199. The government almost forgot to remind its informer witness what he was supposed to say in connection with this most important issue—the crux of its case—according to the government prosecutor. (A. 5, 42). Harris was describing his activities with the Carioscias on January 19, 1970. Harris and Michael Carioscia talked about a prospective narcotic transaction and Harris described the conversation between him and Michael. The following occurred:

> "Q. (The prosecutor) Do you recall any other conversation?
>
> A. (Harris) I don't remember.
>
> Q. Let me ask you this: Did you have some conversation with respect to Mr. Carioscia's sources?
>
> A. I asked him if he was getting it from the same people as before.
>
> Q. Getting what?
>
> A. The heroin and cocaine.
>
> A. He said he was getting the heroin, but he had a different source for the cocaine." (A. 10)

Whatever this equivocation meant, it was interpreted by the government, and by the Court of Appeals (App. A, pp. 4-5) to mean that Guido was the "source" of the narcotics for the Carioscias. But there was no proof, as the trial judge himself pointed out (A. 42) that Guido had been any "source" prior thereto. For when petitioner objected to government exhibits being received into

evidence, which exhibits related to the Carioscia-Harris transactions in August and September of 1970, the court asked the government the basis for their admittance into evidence. The court said that the "source could be anybody", and "How do you tie Mr. Guido into being the source?" (A. 42) The only response by the government was that Guido was the "source" because of where he "was seen with respect to the acts as they occurred." (A. 42)

But aside from there being a total failure of proof that Guido was the "source", except by the *ipse dixit* of the prosecutor's speculation, even so, Guido could not be charged with the sale of narcotics to Harris. See *United States* v. *Raysor,* 294 F.2d 563 (3 Cir. 1961).

Nor could Guido be charged in a conspiracy with the Carioscias if he were selling narcotics to them, because a seller and a buyer may not be charged in a conspiracy. See *United States* v. *Varelli,* 407 F.2d 735 (7 Cir. 1969); *United States* v. *Ford,* 324 F.2d 950 (7 Cir. 1963).

In reaching its verdict, the jury in the case at bar was permitted, if not encouraged, to engage in speculation, conjecture and surmise. The appellate court did likewise. As stated in *United States* v. *Freeman,* 286 F.2d 262, 266 (4 Cir. 1961), "there are suspicious circumstances, 'but evidence creating a mere probability of guilt or giving rise to a mere suspicion or conjecture of guilt is not sufficient'." In the case at bar, the inference of defendant's guilt was so tenuous as to amount to mere speculation. "[N]o conviction may stand upon mere speculation . . ." *United States* v. *Solice,* 332 F.2d 626, 628 (4 Cir. 1964).

On any ground then, the convictions herein should be reversed.

B. *Consideration by the jury and the Court of Appeals of incompetent, prejudicial evidence against petitioner.*

When the government commenced its proof and attempted to introduce its exhibits, an unusual situation arose. Large narcotic transactions occurred between the Carioscia brothers on the one hand, and the undercover agent, Harris, on the other, on several dates preceding any proof of petitioner Guido's alleged involvement. The trial court stated that he did not know why the government introduced evidence, over objections, about August and September 1970, transactions because "it is a rather tenuous connection." (A. 42) And the court was "bothered" about such evidence with respect to transactions earlier than October 14, 1970, and could see no way short of declaring a mistrial, because he did not know any other remedy. (A. 42-43)

There was no other remedy. But all the narcotic exhibits were admitted into evidence anyway, over objections. (A. 43)

But about two and one-half hours into deliberations, the jury sent out a question to the court: "Are we to construe Count 1 of the indictment to begin October 14, 1970 for Louis Guido as opposed to August 1, 1970 as stated in the first paragraph of Count 1 of the indictment?" (A. 49) The court advised the jury it was to consider the commencement as to Guide only beginning October 14, 1970. (A. 49)

The impossible imbroglio then created was that although previously, and with great reluctance and much misgiving the court allowed the narcotics of earlier transactions to be received in evidence for the jury's consideration, and although the prosecutor argued to the jury as to Guido's

responsibility as to the earlier transactions, the judge finally, midway in the jury deliberations told the jury, in effect, to consider only matters commencing with October 14, 1970. (A. 49) But if even the reviewing court mistakenly considered the earlier transactions, then perhaps the jury may be forgiven for using and considering improper and prejudicial evidence against Guido. For, the court of appeals recounted the narcotic sales on August 19, 1970 and September 2, 1970, for which Guido had no responsibility, and which the trial court in effect told the jury not to consider. (App. A, pp. 2-8).

The situation at the appellate level is not too different from the confusion engendered by the trial court in *United States* v. *Turnipseed,* 272 F.2d 106 (7 Cir. 1959). In a multiple defendant bench trial, certain confessions of co-defendants were used as against those defendants making them only, but not against Turnipseed. In reversing, the court stated:

> "Nevertheless, the learned trial judge considered them as evidence against this defendant. The judge stated Turnipseed talked about the checks during the time he drove the automobile. The only evidence of any such statement was in a co-defendant's confession which is not in this record so far as Turnipseed is concerned.
>
> "Where a number of defendants are tried together and evidence is received as to some but not as to the others, it usually is quite difficult for a trial judge to recall at the end of the trial just what evidence was used as against each of the defendants. In the case at bar, the trial judge erred in his recollection as to evidence which had been received against Turnipseed." *Id.* at 107.

* * *

Based upon the absence of sufficient competent evidence probative of petitioner's guilt, his convictions violate due process of law. Certiorari should be granted for this Court to examine and condemn the Seventh Circuit's decision to the contrary, based, as it is, upon consideration of incompetent evidence, suspicion and conjecture. In view of the affirmance by the appeals court, this Court should definitively enunciate the appropriate guidelines for trial and appeals courts to follow in evaluating evidence and in determining whether the evidence is sufficient to support conviction.

C. Inconsistency between the jury's verdict in the case at bar and the trial court's finding acquitting Piemonte.

In acquitting Piemonte with respect to conspiracy and substantive offenses on Oct. 12, 1970, the trial court had before it as evidence the stipulated evidence from petitioner's trial, and uncontradicted evidence that Piemonte was out of the country on Jan. 21, 1971, a date upon which, at petitioner's trial, agents had testified they saw Piemonte with petitioner in Chicago.

Piemonte's acquittal is wholly inconsistent with petitioner's convictions, as is evident from the trial court's decision and order acquitting Piemonte, set forth in full as Appendix C to this Petition, *infra*.

The government's proof (in both cases) was that on October 14, 1970, Piemonte went to Del's restaurant where Guido was employed and walked from the restaurant a block north to Guido's residence at 633 S. Laflin, Chicago. They emerged about five minutes later, at which time Piemonte held in his hand a small brown paper bag. When Guido pointed to the bag, Piemonte tucked it under his jacket. About 12 hours later, Frank Carioscia sold heroin in a brown paper bag to the government's special employee,

Harris. Judge McMillen's reasoning in finding Piemonte not guilty is identical to the argument set out in Guido's original Brief, p. 22. Judge McMillen stated that no one saw Piemonte give to either of the Carioscias any brown paper bag; and no conversations were overheard. "There is, in short, no evidence of what transpired at these brief meetings between Piemonte and Michael Carioscia or Piemonte and Guido." (App. C, p. 12). The trial judge further stated:

> "The purchase money which Franklin had received for the heroin that night was never recovered. The government apparently infers that Piemonte received money from Franklin after the sale and had previously given the brown paper bag of heroin to him at Del's restaurant at about 9:30 p.m. The difficulty with these assumptions is that they leave too much to speculation. There is no logical reasons for Piemonte to get heroin from Guido at 9:20 a.m. and carry it around all day for a sale which was arranged at 2:30 p.m. to be consummated that night. And there is no apparent reason for Piemonte to return to Guido's place of employment at 9:30 p.m., if he had received heroin from him at 9:20 a.m. If Piemonte did in fact have the heroin all day, as the government apparently contends, there is no reason why Franklin would postpone the sale from 8 p.m. to 10 p.m. in order to 'put the package together,' as he told the buyer.
>
> "It can be seen from the foregoing that the government's case against Piemonte boils down to inferring guilt by association. It is true that his association with a proven conspiracy on the date of an illegal sale is suspicious and difficult to account for rationally. But on the other hand he should not be convicted without some hard evidence that he knowingly participated in the conspiracy and sale, and the evidence does not convince me of this beyond a reasonable doubt." (App. C, p. 13)

By the same reasoning, and by the authority in *Panci* v. *United States*, 256 F.2d 308, 312 (5 Cir. 1958), another "brown bag" case, which was cited to the trial court, Judge McMillen should have granted defendant's motion for acquittal at least as to Counts 6 and 7—the counts on which the court found evidence lacking as to Piemonte.

Had the court done that, the jury could not even have asked the court the question that it did: whether or not they were to construe Count 1, the conspiracy count, to begin on October 14, 1970 for Guido. (A. 49)

Eliminated from the jury's consideration would be anything except the evidence of the sale by the Carioscias to Harris on January 20, 1971. Considering the nebulous circumstances of the government's case with respect to Counts 10 and 11, the counts charging sale and possession on January 20, 1971, and considering the necessity for the government in piling inference upon inference, inference upon presumption, presumption upon inference, and presumption upon presumption, the acquittal on counts 6 and 7 would necessarily have weakened the government's presentation to the jury on the conspiracy count and counts 10 and 11.

Yet another inconsistency, albeit not (as the previously discussed one) going to the very heart of the guilt or innocence question, involves Judge McMillen's determination during Piemonte's trial that there was not sufficient proof of his being in the United States on Jan. 21, 1971, [8] where-

[8] See Point 5, *infra*, for the argument that newly discovered proof of this discrepancy in the government testimony necessitated a new trial. While this is not as crucial a contradiction as is Piemonte's acquittal itself, evidence that government testimony was palpably erroneous might have completely turned the tide as to all counts in favor of petitioner.

as at petitioner's trial, agents had testified they observed Piemonte and petitioner together in Chicago on that date.)

The trial court held the interpretation of events of October 14, 1970 to be entirely circumstantial and that, further, the government was premising its case on "guilt by association." App. C, p. 13. In affirming Guido's conviction on less than these same facts as to the evidence of October 14, 1970, the panel, in the case at bar, stated—without any citation of authority—that ". . . a judge may properly find that the evidence is strong enough to submit to a jury even if he was not convinced beyond a reasonable doubt that the defendant is guilty." And, "Of greater significance, however, is the fact that his findings in the Piemonte case need not be consistent with his rulings in the Guido case." (App. A, p. 9)

But such determination is in conflict with long stated principles of law. In testing the sufficiency of evidence to support a judgment of conviction where the case is circumstantial, the court held in *United States* v. *Wroblewski,* 105 F.2d 444, 449 (7 Cir. 1939):

> "It has been held by a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

Accord: United States v. *Standard Oil Co.,* 316 F.2d 884, 899 (7 Cir. 1963); *United States* v. *Fenwick,* 177 F.2d 488, 490, 492 (7 Cir. 1949).

In *United States* v. *Litberg,* 175 F.2d 20, 21 (7 Cir. 1949), the Court said:

> ". . . while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in

> proof, a court of review is charged with the responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof. . . ."

And see, *United States* v. *Collon*, 426 F.2d 939, 942 (6 Cir. 1970): "However, if under such view of the evidence it is concluded there must be some doubt in a reasonable mind, the motion for acquittal must be sustained."

The Court's acquittal of Piemonte, of course, demonstrates such doubt. Yet the Seventh Circuit condones sending Guido's case to the jury on the same evidence.

The reviewing court's opinion here portends dangerous erosion of the very integrity of the judicial system. For example: Suppose a joint trial of two defendants, one of whom is tried by the court and the other by a jury, but before the same court. And assume identical evidence. What the court of appeals in the case at bar has stated is that although the trial judge may find one defendant not guilty because of insufficient evidence to overcome the burden of reasonable doubt, that he then has no legal obligation to direct the jury to acquit as to the other defendant. The anomaly is no less great where, as here, the bench and jury trials did not happen to be contemporaneous.

We fully recognize that inconsistent verdicts by a jury are permissible. However, those considerations which have led to evolution of this principle are inapplicable to the situation presented by the instant case. While no case was discovered presenting a similar problem, *i.e.*, inconsistency between a court's decision and a jury's verdict as to separate counts or defendants upon the same indictment, it has been judicially recognized that the reasons underlying

allowance of inconsistent jury verdicts do not apply to inconsistent findings by a judge sitting as the finder of fact, and consequently such inconsistent judicial findings are fatal to conviction.

In *United States* v. *Maybury*, 274 F.2d 899 (2 Cir. 1960), the trial court found defendant guilty of knowingly having uttered a forged check but not guilty of forgery; these findings were inconsistent on the facts. Recognizing that inconsistent jury verdicts are permissible (per *Steckler* v. *United States*, 7 F.2d 59 (2 Cir. 1925), and *Dunn* v. *United States*, 284 U.S. 390; see 274 F.2d at 901), the court nonetheless reversed since inconsistent findings by the court could not similarly be justified. *Accord, United States* v. *Tankel*, 331 F.2d 204 (2 Cir. 1964).

In enunciating its logic, the court in *Maybury* further held:

> "[W]e reverse for inconsistency . . . not because of any desire for *elegantia juris* but because we can have no confidence in a judgment convicting Maybury of one crime when the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here." 274 F.2d at 905.

Likewise, in the case at bar, there can be no confidence in the jury's guilty verdict against Guido where "the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here."

The reasons underlying permitting inconsistent jury verdicts favor the accused; they are based on "the jury's

assumption of the power to insure lenity." *Id.* at 903. A rule based on such reasons may not be permitted to act as a two-edged sword against the accused.

It does violence to all civilized concepts of justice and fairness to permit Guido's conviction by the jury to stand in the light of the judge's acquittal of Piemonte on the same facts.

Although discrepancy between a jury verdict and a court's finding appears never to have been judicially discussed in any reported case, the appeals court here summarily resolved this question against petitioner without citation of any logic, reasoning or authority. [9]

Certiorari should be allowed to permit this Court to consider and resolve the cardinal issues involved where a jury's verdict, and indeed, a trial court's rulings sending the case to the jury, are patently inconsistent on the facts, with the same court's rulings in a bench trial of a co-defendant.

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[9] Indeed, the court of appeals' decision to rule on the instant case by unpublished order rather than by published opinion, ostensibly pursuant to its Rule 28 (set forth in full at pp. 4-7 *supra*) seems to contravene that Rule's own "guidelines," in that decisions effecting a new rule of law are to be in published opinions.

2.

Petitioner's right to due process of law was violated where there was neither proof of actual or constructive possession of narcotics nor proof of knowledge of illegal importation, and the jury was nonetheless instructed that petitioner could be convicted of illegal possession of narcotics. Moreover, the court's instruction to the jury as to the presumption arising from possession was fatally erroneous, being contrary to due process and in conflict with pertinent instructions required in other federal circuits, for failure to clarify that proof of possession merely permits, but does not require, a finding of knowledge of illegal importation.

A. There is no proof of actual or constructive possession by petitioner nor proof of knowledge of illegal importation which can only stem from proof of possession.

An essential element of the offenses charged under 21 U.S.C. 174 is *knowledge by defendant* that the narcotics were illegally imported. There was no proof of this essential element.

Proof of knowledge of illegal importation of drugs can be presented in either of two ways. The government can introduce affirmative evidence proving such knowledge, as, for example, in a case where a defendant is proven to have himself transported drugs across an international border. Or, the government may rely solely on the statutory presumption legislatively created in Sec. 174. By means of this presumption, the ultimate fact—a defendant's knowledge of illegal importation of drugs—may be presumed upon proof of the fact that he possessed the drugs.

Since there was no direct or circumstantial proof of Guido's actual knowledge of illegal importation, the gov-

ernment relied on the statutory presumption to establish this essential element of the offense. The evidence failed to establish that Guido was ever in possession of any narcotics; therefore the statutory presumption could not be utilized.

The Court of Appeals disposed of petitioner's well-documented argument in this regard merely by citation of *United States* v. *Holmes*, 452 F.2d 249, 258 (7 Cir. 1971), for the proposition that the statutory presumption should apply to the supervisor as well as to the delivery man. (App. A, p. 9) But the difficulty here is that the government has not proved Guido to have been anybody's supervisor. (See Point 1, *supra*).

While the "possession" requisite to bring into play the statutory presumption of Sec. 174 need not be actual or exclusive, and may be constructive or joint, it must be such as to permit the finder of fact to conclude that the defendant actually had the power to exercise dominion and control over the drugs; otherwise the presumption cannot be invoked. *Hernandez* v. *United States*, 300 F.2d 114, 117 (9 Cir. 1962); *Rodella* v. *United States*, 286 F.2d 306 (9 Cir. 1960), *cert. denied*, 365 U.S. 889; *United States* v. *Landry*, 257 F.2d 425, 431 (7 Cir. 1958); *United States* v. *Steward*, 451 F.2d 1203, 1207 (2 Cir. 1971); *United States* v. *Hysohoin*, 448 F.2d 343, 348 (2 Cir. 1971).

In reversing a conviction under Sec. 174, the Seventh Circuit has stated:

> "[N]o court . . . has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person." *United States* v. *Landry*, 257 F.2d 425, 431 (7 Cir. 1958)

> "The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the government would have the court presume the fact [of possession by the defendant.] . . . In our judgment the record is devoid of proof that Landry had possession. It follows that there is no basis for a conviction on counts 7 and 8." *Id.* at 432.

We urge the court to consider in its entirety a decision in conflict with the case at bar, *Hernandez* v. *United States,* 300 F.2d 114 (9 Cir. 1962). Summarizing this decision in a later case, *United States* v. *Estrada,* 441 F.2d 873 (9 Cir. 1971), the appeals court restated its basic principle thus:

> "In *Hernandez,* we held that a co-conspirator's possession of heroin could not be imputed to his co-defendant. In order to activate the [statutory] inference of knowledge of illegal importation arising from possession the Government must prove that each conspirator actually or constructively possessed the narcotics . . ." *Id.* at 879.

Succinctly controlling the facts here, *Hernandez* stated, 300 F.2d at 122:

> "Engrafting the doctrines of vicarious liability taken from the general law of conspiracy upon the presumption of guilt in this highly penal statute would extend the statutory presumption over so wide and uncertain an area of conduct, and with such severe consequences to the actors, that it is a step not to be taken by a court without clear congressional direction."

As to the application of this doctrine since its pronouncement, see the following cases, which reversed: *United States* v. *Febre,* 425 F.2d 107, 111-12 (2 Cir. 1970); *United States* v. *Jones,* 308 F.2d 26, 30-31 (2 Cir. 1962); *Arel-*

lanes v. *United States,* 302 F.2d 603, 606 (9 Cir. 1962); *Brumbelow* v. *United States,* 323 F.2d 703 (10 Cir. 1963); *Williams* v. *United States,* 418 F.2d 159, 162-63 (9 Cir. 1969); *Mason* v. *United States,* 383 F.2d 107, 109-10 (10 Cir. 1967); *Jefferson* v. *United States,* 340 F.2d 193, 197-99 (9 Cir. 1965); *Hill* v. *United States,* 379 F.2d 811 (9 Cir. 1967).

See also *Pratti* v. *United States,* 389 F.2d 660, 662 (9 Cir. 1968), following *Hill* and *Hernandez, supra.*

A recent Second Circuit case adopting the *Hernandez* doctrine, *United States* v. *Hysohion,* 448 F.2d 343 (2 Cir. 1971), is directly in point. We urge the Court to consider this entire case, especially at pp. 347-48, because of its clear pertinence to the case at bar.

All of the above authorities are in conflict with the decision by the Seventh Circuit.

In *United States* v. *Steward,* 451 F.2d 1203 (2 Cir. 1971), two defendants, Sands and Steward, were convicted of various substantive offenses and conspiracy arising out of the transportation and sale of heroin. While affirming the convictions as to Steward, the court reversed all convictions as to Sands, holding:

> "While we have found the evidence was sufficient to sustain the conviction of Steward, we find it inadequate in the case of Sands. The government argues that the evidence was sufficient to establish that Sands had possession of the heroin, or alternatively, that such proof is not necessary where the aider and abettor or conspirator knows that a principal (Steward) had possession and where he was an active participant in the planned transaction. . . . The government cannot attribute Steward's possession to Sands and thereby establish the latter's knowledge of illegal importation

—a necessary element of his conviction as a principal, conspirator or aider and abetter. . . .

"We cannot agree with the argument that Sands' possession of the heroin can be inferred from the fact that he was the armed chauffeur of the car which brought Steward to the motel. Looking at the facts in the light most favorable to the government, there is nothing to establish that Sands exercised any dominion or control over the drugs." *Id.* at 1206-07.

Based on the aforestated principles, with particular emphasis on *Hernandez, Hysohion* and *Steward, supra,* we respectfully urge the Court that permitting reliance on the statutory inference in the light of the record in this case was manifestly incorrect. Absent the evidentiary use of the presumption, there was no evidence of an essential element of the offense, namely, that defendant knew the narcotics had ben illegally imported.[10]

The Court of Appeals disposed of such argument without any discussion of any of the foregoing authorities; and its exclusive reliance upon *United States* v. *Holmes,* 452 F.2d 249 (7 Cir. 1971), is utterly misplaced. (See App. A, p. 9).

The court's decision constitutes a conflict with the authorities heretofore cited from other Circuits. Under the

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[10] The comments by the Second Circuit Court of Appeals are apt here as to the difficulties facing the government in establishing sufficient proof to justify conviction. In *United States* v. *Jones,* 308 F.2d 26 (2 Cir. 1962) the court had this to say:

"The Government's final contention is that all that is required to convict one of having violated 21 U.S.C.A. § 174 is proof that he participated in a transaction with knowledge that the commodity involved therein was a narcotic.

"The violence this contention does to the language of the statute that explicitly requires that the violator have knowledge of the illegal importation of the narcotic, not merely a knowledge that the commodity is a narcotic, is sufficient to force a rejection of the contention." *Id.* at 33.

existing conflicting law among the circuits, a defendant's guilt or innocence may hinge upon the geography of his trial and appeal; under our federal system of uniform substantive criminal law, such divergent results must not be condoned. Certiorari should be allowed to clarify the applicability of a statutory presumption based upon possession to an alleged conspiracy or aider and abettor situation in order to resolve this irreconcilable conflict.

For failure of proof of petitioner's knowledge of unlawful importation, which under the evidence here could stem only from proof of possession—absent here—the convictions should be reversed.

B. The court's instruction to the jury concerning the presumption arising from possession was fatally erroneous for failure to clarify that proof of possession merely permits, but does not require, a finding of knowledge of illegal importation.

With respect to the conspiracy instructions (Tr. 1099-1104), the whole issue was thoroughly obfuscated, as witness the request by the jury for further instructions in connection with conspiracy (A. 49; see Point 4, *supra.*)

With respect to counts 6, 7, 10 and 11, the instruction removing from the government the necessity for proving knowledge of importation [11] on the part of the defendant

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[11] The court's instruction as to knowledge of illegal information is as follows:

> "Knowledge of the illegal importation of the narcotic drug is an essential element of the crime. However, where the evidence establishes beyond a reasonable doubt that the defendant Guido had possession of the narcotic, actual or constructive, as defined in these instructions, it is not necessary to prove that the narcotic was unlawfully imported. Under the law, defendant's possession shall be deemed sufficient to authorize conviction, unless such possession is explained to the satisfaction of the jury." (A. 48).

violated defendant's constitutional right to a proper trial in accordance with due process of law. Such due process requires the government to prove all essential elements of the crime, one of which is, according to the statute in question, proof that defendant had knowledge of the illegal importation. The lead case on the subject is *United States* v. *Peeples,* 377 F.2d 205 (2 Cir. 1967).

There the court instructed the jury as follows:

> "*** the second element with respect to each sale is that the government must satisfy you beyond a reasonable doubt that the defendant knew that the heroin which was the subject matter of this sale had been illegally imported.
>
> "But now with regard to this second element, the importation, the law provides that if you find the defendant had possession of the heroin, than you may, but you are not required to, you may infer that the defendant knew that the heroin was imported contrary to law, unless on all of the evidence you can prove that the defendant had explained his possession of the heroin to you to your satisfaction, and this refers, ladies and gentlemen, to *lawful possession,* to your satisfaction.
>
> "So here you will consider whether on all the evidence, including the defendant's testimony, the defendant has satisfactorily explained to you his possession of heroin and that he did [not] know of the illegal importation." (Emphasis supplied.) *Id.* at 208.

The court reversed, stating:

> "There was serious and prejudicial error in the instructions given by the court below. The initial charge, quoted supra, is deficient in its failure to advise the jury that, despite the operation of the statutory presumption, Peeples would not have violated the statute

> by his having had *unlawful* possession of the heroin if he had no knowledge of its unlawful importation. Within the meaning of Section 174, an accused need not show 'lawful' possession to merit a 'not guilty' verdict; if believed by the jury, evidence disclaiming his knowledge of unlawful importation is sufficient." (citing cases) *Id.* at 209.

In *United States* v. *Christion,* 426 F.2d 787 (9 Cir. 1970), the Court reversed for failure of the trial court to instruct the jury in accordance with *United States* v. *Peeples, supra.* The Court stated that "there was no clear instruction that defendants were to be acquitted unless, upon all the evidence including proof of possession, the jury was satisfied beyond a reasonable doubt that the heroin was unlawfully imported and defendants had knowledge of that fact." *Id.* at 789. Despite the statutory presumption, the Court held that:

> "Even if the defendants' possession of narcotic drugs is unlawful, the jury is to acquit if there is reasonable doubt either that the drugs were imported contrary to law or that defendant knew they were unlawfully imported." *Id.* at 788.

The *Christion* Court relied upon the following cases: *United States* v. *Peeples,* 377 F.2d 205, 209 (2 Cir. 1967); *United States* v. *Llanes,* 374 F.2d 712, 715-16 (2 Cir. 1967); *Chavez* v. *United States,* 343 F.2d 85, 88-90 (9 Cir. 1965); *Griego* v. *United States,* 298 F.2d 845, 848-49 (10 Cir. 1962); and *Verdugo* v. *United States,* 402 F.2d 599, 601, 603 n.3 (9 Cir. 1968).

Another case reversing because a requested *Peeples* instruction was refused is *United States* v. *Birmingham,* 447 F.2d 1313 (10 Cir. 1971). The Court held:

> "As possession creates only a presumption which may be rebutted, the jury should be carefully instruct-

> ed as to the consideration it should give this evidence. The jury may, based on the proof of defendant's possession of narcotics, infer a knowledge of their illegal importation. The jury is *permitted,* but is *not required,* to draw an inference based on its finding beyond a reasonable doubt that the accused had possession of the heroin, unless explained to its satisfaction by the evidence in the case, and find the heroin to have been imported into the United States contrary to law, and to further infer that the accused had knowledge of such illegal importation." *Id.* at 1316-17. (Emphasis ours.)

Note that the Court in *Birmingham* stressed that the statutory presumption *permits,* but does *not require,* the jury to infer illegal importation and defendant's knowledge thereof from proof of the fact of his possession of the drug.

Certiorari should be allowed so that this Court may definitively decide what instruction may properly be given concerning such a statutory presumption; we submit that the one given here does violence to settled case law from other Circuits and to due process as well.

3.

Petitioner's rights under the Sixth Amendment and the Jencks Act were violated by failure of a government agent, who testified against petitioner at trial, to make any notes of his alleged observations, and by the destruction of notes by another such agent, which effectively precluded petitioner from meaningful cross-examination.

In *United States* v. *Missler,* 414 F.2d 1243 (4 Cir. 1969), the court commented upon the practice of FBI agents' destroying their notes made contemporaneously with the events observed and cited *United States* v. *Johnson,* 337 F.2d 180 (4 Cir. 1964):

> "Each time the problem has arisen even the FBI has claimed that the notes were destroyed as part of FBI routine. This is really not a satisfactory answer . . . One of the purposes of both the *Jencks* decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses . . . [citing cases]. The destruction of interview notes does not advance this purpose . . . Eliminating uncertainty may serve the interests of the Government no less than the defendant." *Id.* at 202-03.

In the case at bar, no notes were made by agent Thompson; and he never told anybody from the time of his observations on January 20, 1971 to the date of trial (thirteen months later) what he heard and saw at Turzitto's tavern. He did not even tell any other agent of the events of his observations. (Tr. 41) But Thompson testified he refreshed himself before his testimony with reading a report prepared by agent McNamara of the events on January 20, 1971. (A. 40) There was not a word in McNamara's report from beginning to end reflecting what agent Thompson was supposed to have overheard (A. 40), and although Thompson stated such an omission was an "accidental" omission, he never told anybody what he overheard. There was no reason why he did not tell any other person, any other agent, or any United States Attorney what he had overheard until his testimony thirteen months after the supposed events. (A. 41)

Moreover, agent Koepp, who testified to his observations at the same time and place, admittedly destroyed his notes after relating their contents to agent McNamara; yet McNamara's reports did not even mention Koepp as being at the scene. (A. 35-36)

The appeals court ruled against petitioner without explanation. (App. A, p. 9)

As to the manner of preparing false 3500 reports (or even falsifying where no report is made) see *United States* v. *Meele*, 462 F.2d 918 (2 Cir. 1972). In *Meele*, a narcotics conviction was reversed because, "In this case it is clear from the very inception that the prosecution labored to keep vital information from the defense, the trial judge and the jury. In addition, some official narcotic agents' reports slanted information was inserted and produced to the defense, the judge and the jury in order to even shroud the Government's initial deceit." *Id.* at 924.

And see *United States* v. *Aaron*, 457 F.2d 867 (2 Cir. 1972) where the withholding of a 3500 report caused defense counsel to cross-examine in a certain manner, laying a predicate for impeachment; but then another report was furnished to defense counsel, causing his client to be prejudiced before the jury.

Although Thompson's failure to make any report of his observations, and his testimony that he told not a soul from January 20, 1971 to February 18, 1972 when he testified, (A. 40-41) may be interpreted as going to the weight of his testimony and not to its admissibility, we submit that deliberate failure to prepare notes and preserve them in the form of reports, frustrates a defendant in his right to cross examine and possibly impeach. *Cf. Missler, supra*, at 1303. So too with Koepp's destroyed notes, where McNamara's report does not corroborate even that Koepp was present.

It is too late in the day to question the fundamental principle that the right to meaningful cross-examination is encompassed by the Sixth Amendment right of confrontation. *Alford* v. *United States*, 282 U.S. 687.

Certiorari should be granted to consider the Sixth Amendment's requirements vis-a-vis the Jencks Act, 18 U.S.C. 3500. It appears that this Court has never had occasion to decide this question in a case where, as here, agents both failed to take notes and destroyed notes. And for this violation of his statutory and constitutional rights in an area going to the very heart of the fact-finding process, petitioner's convictions ought to be reversed.

4.

The trial court committed reversible error by precluding the jury, in advance, from the opportunity to inquire about portions of the evidence about which it may have needed its recollection refreshed, particularly in view of the voluminous testimony and evidence of record and the paucity of competent evidence against petitioner. Moreover, such spontaneous instruction by the court constituted an abdication of the responsibility to exercise judicial discretion.

Before it sent the jury to deliberate on the verdicts, the court charged the jury:

> "I might mention that occasionally juries ask if they can see a transcript of testimony because of the court reporter's presence. That I can answer for you in advance. It is not permitted. But if you have any other problems which require a response by the court you can submit them in writing through the U.S. Marshal." (A. 49).

Acknowledging that giving this instruction was error, the reviewing court without discussion or explanation held the error not to be reversible. (App. A, p. 9) Such decision was manifestly incorrect.

The trial was a long one, having started on February 14 and ended on February 22, 1972. Each of the government's witnesses was cross-examined at great length; and many of the government's witnesses testified to considerable detail as to the Carioscias. But Guido's name was brought in only in connection with the October 14, 1970 and January 20, 1971 transactions. (See App. D, *infra.*)

It was error to preclude the jury from requesting that it be refreshed as to the testimony of one or more of the witnesses. As the court stated in reversing the conviction in another narcotic case, *United States* v. *Fiorito,* 300 F.2d 424 (7 Cir. 1962):

> "And if the jury forgot a material answer given by a witness there are circumstances in which the defendants, as a matter of right, would be entitled to have the jury informed as to the testimony of the witness. *United States* v. *Jackson,* 3 Cir. 257 F.2d 41, 43." *Id.* at 426-27.

It should be noted that in *Fiorito,* the trial court also precluded the jury from asking questions about evidence.

In the *Jackson* case, cited in *Fiorito,* the Third Circuit also reversed a narcotic conviction where, during deliberations, the jury made an inquiry about the identity of one of the witnesses, as to whether or not such witness was a government employee. The question was not answered by the court, and the Court of Appeals reversed, stating:

> "The point of the jury's question was highly relevant. The court just explained what entrapment was and on the matter of entrapment the question of whether 'Sarge' was a government employee was certainly something to be considered. In view of the circumstances present in this case, we think that the fail-

ure to permit the reading of the relevant testimony at a time when it would have been useful in the jury's deliberations created unfairness to the defendant.

"That the jury may be given information upon what a witness has said if it is possible to furnish it is well settled." 257 F.2d at 43.

While re-reading of evidence after the jury retires lies almost exclusively within the good judgment of the trial court, *United States* v. *DePalma*, 414 F.2d 394 (9 Cir. 1969), even that case recognizes that, in each instance where the jury may request evidence to be re-read, "It is within his [the trial judge's] discretion to determine if the jury's request should be granted or denied." *Id.* at 396.

The only reasonable conclusion to be reached from this position of the reviewing court is, that if the jury in a particular case in fact requests to have certain evidence read after deliberations have begun, the trial judge must exercise his good judgment and discretion as to whether or not to allow such request in the context of the case in question. To issue instead, as in the case at bar, a blanket denial in advance of any such request, constitutes an abdication, not an exercise, of the court's responsibility in this regard. Such premature decision, not based on the facts and circumstances of a specific request, amounts to an abuse of discretion, for, in fact, no discretion has been exercised in such a situation. *Cf. United States* v. *Daniels*, 446 F.2d 967 (6 Cir. 1971), to the effect that, while the sentencing decision is clearly within the trial court's discretion, still such decision will be reversed on review where it is evident that his discretion was not exercised at all.

Upholding the trial court's refusal to grant the jury's request in *DePalma, supra,* the court noted, "Here the

judge acted and explained his reasons for so acting [upon a particular jury request.]" 414 F.2d at 396. In the case at bar, however, the court did *not* act; he flatly denied any and all anticipated requests before any were made.

Although the court in *United States* v. *Schor,* 418 F.2d 26 (2 Cir. 1969), noted a preference for having requested portions of the evidence read to the jury rather than sending a written transcript of such testimony to the jury room, still the latter procedure, even in that case, was not held erroneous. Indeed, the court recognized that either procedure—oral or written—is legally permissible. *Id.* at 31.

In *United States* v. *Rabb,* 453 F.2d 1012, 1014-15 (3 Cir. 1971), the court reversed because the trial court had improperly refused to grant the jury's request to have certain testimony read to them after they had retired to deliberate, relying squarely on *United States* v. *Jackson,* 257 F.2d 41 (3 Cir. 1958).

The court, in *Rabb,* 453 F.2d at 1015, also relied upon the ABA's Standards Relating to Trial by Jury (ABA Project on Minimum Standards of Criminal Justice), Sec. 5.2 (Approved Draft 1968), as follows:

> "Jury request to review evidence.
>
> (a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to reexamine the requested materials admitted into evidence."

Amid the morass of conflicting evidence and complicated rules of law, the jury should not have been discouraged

from asking for clarification of the evidence. Yet this was the natural and probable consequence of the court's statement.

Of course, we will never know what questions about the evidence might have come to the minds of the jury. As they were foreclosed from asking the court about the *evidence* in the case, they did ask about the law involved as to how to treat the commencement of the alleged conspiracy. The jury sent out a written message asking whether it should construe the conspiracy count to have begun on October 14, 1970 as opposed to August 1, 1970 as stated in the indictment. (A. 49) Although the court advised the jury in the affirmative, it had previously allowed the jury to consider all acts and declarations of the Carioscias in August and in September of 1970, and, over objections, the court permitted the jury to consider the narcotics which were sold to Harris by the Carioscias in August and September, 1970. How could the jury properly sift the evidence?

As the court itself said, there was "tenuous" connection of Guido to certain events (A. 42). Maybe the jury would have wanted being refreshed as to the paucity of evidence on certain points. Accordingly, it was error to cut off *in limine* the possible request by the jurors for some part of the testimony to be read to them.

Apparently this Court has never ruled on the instant issue. Certiorari should be granted, and this court should declare the impermissibility of such abdication of judicial responsibility. Considering the posture of the evidence, the error was prejudicial to petitioner.

5.

The trial court's denial of petitioner's motion for new trial based on newly discovered evidence constituted an abuse of discretion, where the newly discovered evidence conclusively established the falsity of certain government evidence, and subsequently was taken as true by the trial court in the bench trial of petitioner's co-indictee wherein said co-indictee was acquitted. Under these circumstances, petitioner's convictions may not be permitted to stand consistent with due process of law.

After conviction on February 22, 1972, petitioner filed his motion for new trial based on newly discovered evidence. The motion and supporting affidavits demonstrated that co-defendant Rudolph Piemonte was in Acapulco, Mexico on January 19 and 20, 1971 and therefore could not have been in Chicago on those dates. (R. 30).

At the time the court denied the motion for a new trial, petitioner had not yet proven his assertions that Piemonte was in Mexico on January 19 and 20, 1971 and therefore could not have been seen by agents Chown and Young who stated they saw him on those dates.

Subsequently, and before decision by the appeals court, the trial court held, in finding Piemonte not guilty, that he had a reasonable doubt as to whether Piemonte was in the country on the date in question.[12] (App. C, p. 11)

The trial court ruled the petitioner made a "sufficient showing of newly discovered evidence. . . ." (Tr. 5/19/72,

[12] Judge McMillen's order in Piemonte was of record in the Court of Appeals, and this issue was additionally briefed in Guido's Supplemental Brief filed therein after such order was entered.

p. 13-14) and was inclined to grant a new trial (p. 37) as to Counts 10 and 11 only. (Tr. 37-38) (Those counts related to January 19 and 20, 1971.)

However, the court changed its prospective ruling and denied the motion for new trial on June 19, 1972. (R. 34, 36). The Court of Appeals found no error, again with absolutely no discussion, citation of authority, or justification for its decision. (App. A, p. 9)

Agents Chown (A. 34) and Young (A. 23) testified they saw Piemonte talking with petitioner and the Carioscias on January 19, 1971. If petitioner had had proof of Piemonte's whereabouts on that date, defense counsel could have impeached the agent-witnesses, thus casting doubt upon their credibility as to other observations as well.

The case against petitioner was both wholly circumstantial and highly tenuous. Thus each item of surveillance evidence presented by the government must be viewed as a piece of the whole cloth. If any thread of it be discredited in the mind of the jury, the jury might well have concluded that other government evidence was similarly lacking; in any event, the jury might have found a reasonable doubt as to defendant's guilt and acquitted him if they were convinced that any government agent testified falsely or mistakenly in any significant particular.

In his motion, petitioner set forth that Rudolph Piemonte's whereabouts were unknown to him until after petitioner's trial.

Fundamental fairness demands that a new trial be ordered at which the jury should be permitted to consider that Rudolph Piemonte was out of the country at a time

when government witnesses testified he was seen with defendant in Chicago.

Although generally a motion for new trial will not be granted where the newly discovered evidence is "merely cumulative or impeaching," *Mesarosh* v. *United States,* 352 U.S. 1; *United States* v. *McWilliams,* 421 F.2d 1083, 1084-85 (8 Cir. 1970), *cert. denied,* 397 U.S. 1070; *United States* v. *Rutkin,* 208 F.2d 647, 649 (3 Cir. 1963), the test must be viewed, not in the abstract, but as it has actually been applied by the courts.

As applied in the better-reasoned decisions, the test is: If the evidence is newly discovered, a new trial should be allowed if it is likely that a jury hearing such evidence might have a reasonable doubt as to defendant's guilt, even if the thrust of the newly discovered evidence is impeaching in character.

In *Mesarosh* v. *United States,* 352 U.S. 1, this Court ordered a new trial where the credibility of one government witness (of a total of seven who had testified against defendant) was wholly discredited by subsequent events involving his having perjured himself at subsequent trials. The outcome would very likely be affected had the jury known how lacking in credibility this witness was; hence, a new trial was in order, even though the newly discovered evidence went only to credibility.

Many cases recognize that newly discovered impeaching evidence may properly form the basis for granting a motion for new trial, if the evidence is such that a jury *might* have a reasonable doubt of defendant's guilt upon consideration of the newly discovered evidence.

In a case, where the newly discovered evidence was "merely impeaching," the court held that a motion for new trial should have been granted. *Ingram* v. *Peyton,* 367 F.2d 933, 936-37 (4 Cir. 1966). The Court held:

> "After-discovered evidence, which is merely impeaching, cumulative or corroborating will not ordinarily invalidate a verdict, but if such evidence is of a character to raise a substantial likelihood that it would have affected the result if known at the trial, its nondisclosure cannot be ignored."

Other cases granting a new trial, even though the newly discovered evidence was of an impeaching nature, include: *United States* v. *Miller,* 411 F.2d 825, 831-32 (2 Cir. 1969) (test is whether the newly discovered impeaching evidence could have induced in the jury a reasonable doubt to avoid conviction); *Coates* v. *United States,* 174 F.2d 959, 960 (D.C. Cir. 1949) (test is whether newly discovered impeaching evidence might very well have raised a reasonable doubt with the jury as to defendant's guilt); *United States* v. *Gordon,* 246 F. Supp. 522 (D. D.C. 1965); *Hawkins* v. *United States,* 324 F.2d 873 (5 Cir. 1963); *Arbuckle* v. *United States,* 146 F.2d 657, 659-60 (D.C. Cir. 1944).

It is important to remember that the test is not whether the judge believes that the newly discovered evidence would raise in his own mind a doubt as to defendant's guilt.

> "[I]t is not the function of a trial judge to decide finally what the verdict should be, but simply to determine whether the newly discovered evidence should be submitted to a new jury. So, if the trial judge feels that the newly discovered evidence might well result in a different verdict . . . it is his duty 'in the interest of justice' to grant a new trial." *United States* v. *Mitchell,* 29 F.R.D. 157, 159 (D.N.J. 1962) (New trial granted.)

In *Mejia* v. *United States*, 291 F.2d 198, 200-01 (9 Cir. 1961), defendant had made certain admissions, but at trial claimed he had done so falsely in order to look like a "big-shot." He gave alibi testimony, and was convicted. Subsequently defendant moved for a new trial, claiming the new discovery of a disinterested witness to corroborate his alibi. The trial court denied the motion, saying the jury could not possibly reach a different verdict in view of defendant's admissions. The appellate court reversed, stating, "[it is] too dogmatic to say that the jury could not . . . regard the . . . [newly discovered evidence] as sufficient to raise a reasonable doubt notwithstanding the admissions made by the appellant." *Id.* at 201.

Moreover, a slightly different test prevails where, as here, the newly discovered evidence is of such nature that, if believed, it established that government witnesses have testified either falsely or mistakenly, through inadvertence. This rule was formulated by the Seventh Circuit in *Larrison* v. *United States*, 24 F.2d 82, 87-88 (7 Cir. 1928), which held that a new trial should be granted if:

> "(a) The court is reasonably well satisfied that the testimony is false;
>
> (b) That without it the jury might have reached a different conclusion;
>
> (c) The party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it . . . until after the trial." *Id.* at 87-88.

In addition to the foregoing authorities, we further submit for consideration the following cases:

Motions for new trial based on newly discovered evidence granted by district court: *United States* v. *Miller*, 61 F.Supp. 919 (D.C.N.Y. 1945); *United States* v. *Segelman*, 83 F.Supp. 890 (D.C. Pa. 1949).

Motions for new trial based on newly discovered evidence had been denied by district court; appellate court reversed and remanded for full hearing on merits of defendant's motion:

United States v. *Stewart*, 445 F.2d 897 (8 Cir. 1971);

Jackson v. *United States*, 371 F.2d 960 (D.C. Cir. 1966);

Hamilton v. *United States*, 140 F.2d 679 (D.C. Cir. 1944);

Harrison v. *United States*, 7 F.2d 259, 262 (2 Cir. 1925);

Rubenstein v. *United States*, 277 F.2d 638, 642-43 (10 Cir. 1955);

DeBinder v. *United States*, 303 F.2d 203 (D.C. Cir. 1962);

Casias v. *United States*, 337 F.2d 354 (10 Cir. 1964);

Richardson v. *United States*, 360 F.2d 366 (5 Cir. 1966); after remand, district court denied motion after full hearing on the merits; *aff'd after remand*, 376 F.2d 845 (5 Cir. 1967);

Brodie v. *United States*, 295 F.2d 157 (D.C. Cir. 1961).

Motions for new trial based on newly discovered evidence had been denied by district court; appellate court reversed with directions to grant a new trial:

United States v. *Chisum*, 436 F.2d 645 (9 Cir. 1971);

Blocker v. *United States*, 274 F.2d 572 (D.C. Cir. 1959);

Griffin v. *United States,* 183 F.2d 990 (D.C. Cir. 1950);

Delbridge v. *United States,* 262 F.2d 710 (D.C. Cir. 1968);

Amos v. *United States,* 218 F.2d 44 (D.C. Cir. 1954);

Nagell v. *United States,* 354 F.2d 441 (5 Cir. 1966); conviction after new trial; *rev'd and remanded* with directions to acquit, 392 F.2d 934 (5 Cir. 1968);

Newsom v. *United States,* 311 F.2d 74, 78-79 (5 Cir. 1962); conviction after new trial; rev'd for insufficient evidence, 335 F.2d 237 (5 Cir. 1964).

In sum, we submit that a new trial should be granted in the interest of justice. It is important to remember that the witnesses impeached by the newly discovered evidence are government agents. If the jury be convinced that they gave false or mistaken testimony, how can the court conclude otherwise than that the jury would begin to doubt other portions of the government's circumstantial case in which defendant's guilt was certainly not overwhelmingly proven; or that in any event, that the jury, had they had the newly discovered evidence before them at trial, might not have found a reasonable doubt as to defendant's guilt and acquitted him?

Certiorari should be granted to consider these issues, particularly since the trial court subsequently itself accepted the truth of the new evidence. At the very least, petitioner should be afforded a new trial.

6.

The Appellate Court's issuance of its "order", deciding matters of substantive constitutional import summarily in favor of the government and against petitioner, without discussion of petitioner's properly raised arguments and authorities, deprived petitioner of meaningful appellate review, in violation of his Fifth Amendment due process rights. Certiorari should be allowed to review the present "order" decisional system being employed by court rule in the Seventh Circuit to determine whether such rule, as applied by the court, undermines and violates the right to meaning appellate review of federal constitutional claims.

A direct appeal from a United States District Court to a Court of Appeals is a matter of right, fundamental to due process of law. *Coppedge* v. *United States,* 369 U.S. 438, 441; *Arrastia* v. *United States,* 455 F.2d 736 (9 Cir. 1972). We submit that the presently utilized procedures of the Court of Appeals for the Seventh Circuit effectively thwart the exercise of such right.

Ostensibly following the provisions of Rule 28 of the Rules of the Court of Appeals for the Seventh Circuit,[13] the court decided petitioner's case by way of an unpublished "order" rather than a published opinion. Under Rule 28, cases disposed of by "order" need not contain discussion of reasons for the rulings. The determination whether to decide a case by order or by opinion is left to the panel deciding the case, based upon guidelines contained in the Rule. Under these guidelines, orders rather than

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[13] The Rule is fully set forth at p. 4, *supra.*

opinions are permitted *inter alia* in cases where no questions of general import are raised; moreover, orders may be cited as legal authority within the Circuit, either by parties or by courts.

As applied to petitioner, utilization of this Rule and disposition of his case by a written order constitutes a mockery of the appellate process. Moreover, and perhaps more importantly to the greater considerations of the administration of justice, such disposition of an appellant's case at the unbridled discretion of the deciding appellate judges effectively precludes other prospective defendants and appellants from even knowing of such a decision's existence, and actually precludes them from relying on such decision. When obviously important issues of constitutional dimension, not nearly so clear-cut against petitioner as the court of appeals "order" would lead one to believe, may be decided out of hand with a simple, "we find no merit in appellant's position," it becomes apparent that Rule 28 is not being implemented in accordance with its salutary stated purposes.

The only issue treated in any depth by the reviewing court is petitioner's contention that the evidence was insufficient. However, while petitioner's argument on this point occupied some 14 pages of his original brief, and cited numerous authorities, the reviewing court's only case citation directed to this issue was *Glasser* v. *United States,* 315 U.S. 60, for the proposition that on appeal, the court must construe the evidence most favorable to the government. (App. A, p. 4) No attempt was made to distinguish the relevant cases dictating reversal (as also set forth herein; see Points 1 and 2, *supra*).

The only case aside from *Glasser* which the court mentioned was *United States* v. *Holmes*, 452 F.2d 249 (7 Cir. 1971), cited without discussion as support for the trial court's having given the instruction concerning the statutory presumption. (App. A, p. 9) (As previously noted that cited case was factually inapposite to the case at bar. See Point 2, *supra*.) And the court's "reasoning" on the judge-jury inconsistency is specious. (See Point 1C, *supra*.)

As to petitioner's other contentions, they received the following short shrift:

> "We find no error in the denial of the motion for a new trial on the ground of newly discovered evidence, or in the claimed violation of the Jencks Act. Finally, although the court's comments that the jury could not see the transcript may have implied, improperly, that the jury could not make any inquiry of the court during these deliberations, that comment certainly was not reversible error." (App. A, p. 9)

Based upon the arguments raised and documented in the foregoing portions of this Petition, all of which were fully briefed and argued below, it is clear that the appellate court's decision by its "order" does not fully or fairly dispose of petitioner's contentions, none of which may be deemed frivolous, all of which are substantial, some of which are of first impression, and all of which raise questions of substantive constitutional law. Such disposition of his appeal amounts to an abuse of appellate discretion, and this Court should act in the exercise of its supervisory power over the federal courts to remedy the situation.

This Court recently has spoken to the necessity of prisoners' meaningful access to the courts, holding that deprivation of same constitutes a violation of their civil rights,

and condemning the discouragement of legal recourse by various prison methods. *Johnson* v. *Avery*, 393 U.S. 483.

Certiorari should be allowed to review the claim that petitioner has not been afforded an effective appellate review.

Conclusion

For any of the foregoing reasons this Petition for the Writ of Certiorari should be granted.

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